

THE NATIONAL LABOR RELATIONS BOARD

THE WANG THEATRE, INC.,)	
Employer,)	
)	
and)	Case No. 01-RC-166997
)	
BOSTON MUSICIANS' ASSOCIATION,)	
LOCAL 9-535, AFM, AFL-CIO,)	
Petitioner.)	

WTI'S MOTION TO STRIKE BMA'S OPPOSITION TO REQUEST FOR REVIEW

Wang Theatre, Inc. ("WTI") hereby moves to strike the Opposition of the Boston Musicians' Association, Local 9-535, AFM, AFL-CIO ("BMA") to WTI's Request for Review of the Decision and Direction of Election of the Acting Regional Director of Region 1 ("DDE"). The Board should not credit the BMA's effort to rely on facts not in the Record to rescue a Direction of Election that cannot be justified by the Record.

1. The Board should strike the Opposition because it relies principally on "facts" that are outside of and contradicted by the record. While the Opposition purports to summarize various AFM-producer collective bargaining agreements, [Opp. 3-4], BMA refused to enter those agreements into the record during the hearing, [Tr. 80]. While the Opposition claims to know of discussions between WTI and the producers of *Wizard of Oz*, [Opp. 9 n. 11], the only evidence is that those negotiations were ongoing at the time of the hearing, [Tr. 35]. While the Opposition claims that the direct-hiring of musicians by the producers *Elf: The Musical* was somehow a "response" of WTI to organizing by BMA, that is contradicted by the record: the musicians who were in the *Elf* orchestra were represented by the BMA's parent international, the AFM, [Tr. 16]; and further the unrebutted testimony is that producers, not WTI, decided that producers would directly hire all musicians that were needed for that show, [Tr. 34].

If the Board believes that additional evidence is necessary to resolve this matter, then it should remand and order the Region to reopen the hearing. If the Board does so, then WTI may also choose to offer supplemental evidence. WTI has reason to believe that BMA and some producers are currently negotiating regarding potentially expanding the scope of the current AFM-producer collective bargaining relationships to include local musicians hired directly by the producer.

2. BMA departs from the Record, because it can make no effective argument based on the Record. The Opposition does not contest the two fundamental flaws of the putative unit. First, BMA acknowledges that the third-party producers, not WTI, are the primary employers of the musicians in the putative unit. BMA does not dispute that the producers: control the amount of work; exercise day-to-day supervisory authority; and indirectly set wages and benefits. Consistently, BMA does not argue WTI is anything more than a supplier of musicians.

The Board has never before endorsed such a single-employer unit that excluded the primary, user employers. BMA cannot justify doing so here. BMA states that if certified its bargaining goal would be to pressure the producers to layoff their own musicians and use local musicians hired by WTI. *See* [Opp. 3-5, 9]. While BMA labels this “productive bargaining”, it would be so only because unlawful secondary pressure sometimes is productive. Tellingly, BMA ignores *Associated Musicians of Greater New York, (Huntington Town House)*, 203 NLRB 1078 (1973). Moreover, such pressure certainly would not be bargaining between WTI and BMA. BMA cannot justify the disconnect between the employers whom it would seek to pressure (the producers) and the “employer” who would have a duty to bargain if BMA were certified (WTI). Although ignored by the Opposition, *Browning-Ferris Indus. of California, Inc.*, 362 NLRB No. 186 (Aug. 27, 2015), counsels that the Act requires bargaining between a union and the employer

with “ultimate control” over the terms and conditions of employment and BMA must seek to bargain with them, not with WTI.

Second, BMA also acknowledges that there has been no employment in the unit since 2014. [Opp. 2]. The Board has never endorsed an election when there had not been any employment in the prior year. Again, BMA cannot justify the Acting Regional Director taking an unprecedented step here. BMA apparently believes that a representation election can create an employment relationship: “when the BMA is certified, any future union productions (unless self-contained and AFM approved) would require the hiring of local musicians by the Wang.” [Opp. 9]. That is simply wrong as a matter of law. No Board precedent supports the proposition that an “employer”, which has not been employing anyone in the putative unit prior to the election, must begin hiring employees into the unit after a union is certified. And WTI would not be under any such obligation here. Even if BMA were certified, the producers could continue to directly hire and solely employ any musicians the producers needed for their shows. In short, BMA continues to put the cart (an election) before the horse (employment).

Instead of addressing the above two fundamental flaws of the unit, the Opposition focuses on the meaning of the so-called *Julliard School* formula. First, WTI submits that the BMA’s reading of that formula is wrong. BMA cannot escape the Board’s explanation of the *Julliard School* formula by the Board in *Steppenwolf Theatre Co.*, 342 NLRB 69 (2004). BMA concedes that there are no eligible musicians here under the *Julliard School* formula as explained by *Steppenwolf Theatre*. But even if BMA’s reading of the *Julliard School* were correct, the putative unit would still not be appropriate. The two flaws discussed above are fundamental, not technical. Critically, BMA disputes neither that the independent producers are the primary employers of the unit, nor that there has been no recent employment in the unit.

Conclusion

Based on the foregoing, WTI respectfully requests that the Board strike the BMA's Opposition.

Respectfully submitted,

WANG THEATRE, INC.

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Certificate of Service

The undersigned certifies that the foregoing has been filed electronically with the National Labor Relations Board on the 14th day of March 2016, and also a copy has also been sent via email to counsel for Petitioner, Gabriel O. Dumont, Jr., at gdumont@dmbsp.net; and the Acting Regional Director of Region, Elizabeth A. Gemperline, at elizabeth.gemperline@nrlb.gov.

/s/ N. Skelly Harper_____